

FREQUENTLY ASKED QUESTIONS CONCERNING FMLA FOR EXECUTIVE BRANCH EMPLOYEES

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1. What is the FMLA?

The FMLA is the Family and Medical Leave Act of 1993, a federal law providing up to 12 weeks of “job-protected leave” within a 12 month period for eligible employees in the event that the employee must be away from work for an extended period of time as a result of a serious health condition for self-care or the care of a member of the employee’s immediate family.

The law provides for the continuation of group health coverage during that leave under the same terms and conditions as if the employee had not taken leave.

The law was amended on January 16, 2009, and was further modified by adoption of the National Defense Authorization Acts for fiscal years 2008 and 2010 expanding benefits for certain military families. The law applies to all State agencies, regardless of the number of employees.

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2. Am I entitled to FMLA leave?

An employee is eligible for FMLA leave if:

- The employee has worked for the State, or has been maintained on the payroll, for at least 12 months or 52 weeks, not necessarily consecutively, before taking the leave. Previous periods of employment for the State (when employees have had a break in service of less than 7 years) must be considered in calculating eligibility; and
- The employee has worked at least 1,250 hours for the State during the 12 months period immediately prior to the date on which leave will begin. The 1,250 hours include only those hours actually worked for the employer. Paid leave and unpaid leave, including FMLA leave are not included in determining

whether or not the employee has worked 1,250 hours. (Special rules apply to National Guard members and members of the Reserves called away for active duty.)

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3. When can FMLA leave be used?

- For the birth of a child and to care for the newborn child of the employee within one year of the child's birth;
- For the placement of a child for adoption or foster care and to care for the newly placed child within one year of placement with the employee;
- To care for a family member with a serious health condition;
- For the employee's own serious health condition that makes the employee unable to perform the functions of his or her job; or
- For certain military-related reasons.

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4. Who is considered a "family member" for purposes of taking FMLA leave?

An employee's spouse, children and parents are the only immediate family members recognized by the FMLA. Grandparents, brothers, sisters, "in-laws" and other, similar family members are not considered immediate family for purposes of FMLA leave. Although recent changes to State law and the Collective Bargaining Agreement(s) may extend certain leave benefits for bargaining unit members when leave is taken to care for persons who would not be considered "immediate family" under the language of the federal law, and FMLA job-protected leave provisions would not apply.

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5. Which provisions apply to military families?

The National Defense Authorization Acts for Fiscal Years 2008 and 2010 amended the FMLA to provide two important leave entitlements for military families:

Qualifying Exigency Leave

Eligible employees who are the spouse, son, daughter, or parent of a military member may take up to 12 weeks of FMLA leave during any 12-month period to address the most common issues that arise when a military member is deployed to a foreign country. These may include activities such as attending military sponsored functions, making appropriate financial and legal arrangements, and

arranging for alternative childcare. This provision applies to the families of members of both the active duty and reserve components of the Armed Forces.

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Military Caregiver Leave

Eligible employees who are the spouse, son, daughter, parent or next of kin of a covered servicemember may take up to 26 weeks of FMLA leave during a single 12-month period to care for the servicemember who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred or aggravated in the line of duty on active duty. This provision applies to the families of members of both the active duty and reserve components of the Armed Forces. Under the 2010 NDAA amendments, the definition of "covered servicemember" is expanded to include a veteran "who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness" if the veteran was a member of the Armed Forces "at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy."

An employer may require an employee to submit certification supporting a request for qualifying exigency or military caregiver leave.

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6. What is the "12 month period" for taking FMLA leave?

Federal law allows employers to select one of four ways to calculate the 12 month period within which an employee can use FMLA leave. Since its inception, the State of New Hampshire has used a "rolling 12 month period" looking backward from the first day on which FMLA leave is to be taken to determine leave entitlement. Employees may not take more than 12 work weeks of FMLA leave within that 12 month period.

The only exception is for military caregiver leave. Federal law requires that the 12 month period be counted forward on the basis of a rolling 12 month period, with the first day that leave is needed counting as the first day of the 12 month period.

7. Can I take both FMLA and Military Caregiver leave in the same 12 month period?

Employees can take both FMLA and Military Caregiver leave, but the combined total may never exceed 26 weeks in a single 12 month period, and leave taken as FMLA leave may not exceed 12 weeks in any 12 month period.

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8. What do I have to do to request FMLA leave from my employer, or to notify my employer of my need for leave?

You are required to provide your employer with 30 days advance notice when the need for leave is "foreseeable." When such an advance notice is not possible or the need for the leave cannot be foreseen, you must give your employer notice as soon as "practicable." Generally, this means within two business days. In all cases, you are required to comply with your employer's policies for calling in and reporting leave to be taken.

9. Can I decide whether or not to use my entitlement to FMLA leave?

No. If your absence qualifies under the FMLA and you have FMLA leave available, your absence will be counted against your FMLA entitlement whether you are in paid or unpaid leave status. The law permits employers to designate qualifying absences as FMLA leave, and it has been the State's policy in all State agencies since the law was enacted in 1993, to designate qualifying leaves as FMLA leave.

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10. Do I have to use accrued leave if I would prefer to take unpaid leave?

Absences due to the employee's own serious medical condition, including disability or incapacitation due to pregnancy or the birth of a child, shall be deducted from the employee's available balance of accrued sick leave first, then from any accrued compensatory time. If the employee exhausts sick leave and compensatory time during the period of an approved FMLA leave due to the employee's own serious medical condition, the employee may elect to use any other accrued paid leave for the remainder of the FMLA leave, or the employee may elect to take the remainder of such leave without pay. Although employees may supplement their Workers Compensation benefits by "cashing in" accrued annual leave or sick leave, under no circumstances will an employee be required to use accrued annual leave or sick leave if the employee is on Workers Compensation.

When employees have leave available within the fiscal year for care of an ill or injured dependent, absences related to an immediate family member's serious health condition will first be counted against the employee's available sick dependent leave reserved for care of a family member with a serious health condition who is "incapable of self-care." If an employee exhausts his or her entitlement to dependent care leave, the agency will apply any available compensatory leave time. Once available dependent care leave and compensatory leave are exhausted, the employee may elect to take the remainder of such leave

without pay, or the employee may use other available, accrued leave including annual leave, bonus leave and floating holidays.

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11. Does Workers Compensation leave count against an employee's FMLA leave?

Yes. FMLA and Workers Compensation leave are applied concurrently, provided that the reason for the absence is due to a qualified job-related serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

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12. Can I take FMLA leave for visits to a therapist, if my doctor prescribes the therapy?

Yes. FMLA permits you to take leave to receive subsequent treatment by a health care provider. This can include recurring absences for therapy treatment ordered by a doctor.

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13. Do I have to give my employer my medical records for leave due to a serious health condition?

No. You do not have to provide medical records. However, if leave is taken for a serious medical condition, or the serious medical condition of a family member, the employer may require you to provide a medical certification confirming that a serious health condition exists and that you are unable to perform the essential functions of your position.

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14. What kind of proof is required for my illness or that of an immediate family member?

You may be required to submit documentation called a "medical certification" from the health care provider who is treating you or your immediate family member. (You can use one of the following forms.)

[WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition \(PDF\)](#)

[WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition \(PDF\)](#)

[WH-385 Certification for Serious Injury or Illness of Covered Servicemember -- for Military Family Leave \(PDF\)](#)

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15. What can happen if I refuse to provide medical certification that my employer requests?

If you fail to provide medical certification, your leave will not be "job protected." Further, New Hampshire State employees who refuse to provide medical certification may be subject to the disciplinary provisions of the Rules of the Division of Personnel.

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16. Can my employer refuse to grant me FMLA leave?

If you are an "eligible" employee who has met FMLA's notice and certification requirements (and you have not exhausted your FMLA leave entitlement for the current leave period) you should not be denied FMLA leave, and you should enjoy the employment protections and continuing medical benefits that the FMLA provides.

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17. Who ultimately decides if the leave is FMLA or not?

The employer is required to designate leave as FMLA leave if an employee's absence qualifies for FMLA leave, based on information from the employee. Such information normally will include complete and sufficient certification of the need for leave from the employee's health care provider.

18. Do I have to take the leave in one continuous block of time?

In some cases, leave can be taken intermittently, meaning that leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments because of the serious health condition,

or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

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19. Can the employer count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for the birth and care of my child?

Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12 months period. If the employee has to use some of that leave for another reason, including a difficult pregnancy, it may be counted as part of the 12 week FMLA entitlement.

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20. Can fathers take FMLA leave for the birth of a child or because of an adoption or foster care placement?

FMLA leave taken for the birth of a child, or because of an adoption or foster care placement applies to both parents. The leave must be taken as continuous leave, unless the employer agrees to allow intermittent leave usage, and the leave must be taken within 12 months of the birth, adoption or placement.

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21. What if I have to go to court or travel to a foreign country in order to complete the adoption?

That leave taken prior to the adoption can be taken as FMLA leave in most instances, but only to the extent that the time is clearly related to the adoption itself.

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22. Who pays for my health insurance while I am on FMLA leave?

All employees, whether they are on paid or unpaid leave, are responsible for making their normal bi-weekly contribution toward the cost of health care during an approved FMLA leave in order to have the employer pay its portion of the costs. Employees should make payment arrangement directly through their employer for periods of extended leave.

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23. Can my employer make inquiries about my leave during my absence?

Yes, but only to you. Your employer may need to confirm whether the leave needed or being taken qualifies for FMLA purposes. The employer may require periodic reports on your status and intent to return to work after leave. If there is a reason to doubt the validity of a medical certification, the employer may require you to obtain an updated certification. In some cases, the employer may require you to obtain a second opinion from another medical provider at the employer's expense.

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24. Can my employer require me to return to work before I exhaust my leave?

Subject to certain limitations, your employer may deny the continuation of FMLA leave due to a serious health condition if you fail to fulfill any obligations to provide supporting medical certification, or if circumstances change so that leave is no longer necessary. The employer may not, however, require you to return to work early by offering you a light duty assignment.

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25. Are there any restrictions on how I spend my time while on leave?

Generally, no, provided that the leave is taken for a legitimate family or medical reason and all appropriate notice and certification requirements are met. Except in the case of intermittent leave, employees who are absent on FMLA leave for their own serious medical condition may not be permitted to work at all during the period of approved FMLA leave. The protections of FMLA will not, however, cover situations where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

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26. If I am taking leave for my own serious health condition or to care for a family member with a serious health condition, can I travel while I am on approved FMLA leave?

Only if the travel is medically necessary.

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27. Will I lose my job if I take FMLA leave?

It is unlawful for an employer to interfere with or restrain or deny the exercise of any right provided under the law. However, FMLA leave will not protect an employee from loss of employment in a bona fide reduction in force that affects the employee's position, nor will the employee be protected from loss of employment for fraudulent use of leave or other serious misconduct that would otherwise result in the employee's dismissal.

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28. Are there other circumstances in which my employer can deny me my job after using FMLA leave?

- Employers are not required to reinstate employees who would have been laid-off or otherwise had their employment terminated had they continued to work during the period leave was used.
- Under certain circumstances, employers who advise employees experiencing a serious health condition that they will require a medical certificate of fitness for duty to return to work may deny reinstatement to an employee who fails to provide the certification, or may delay reinstatement until the certification is submitted.
- Although other benefits and protections may apply, employees who are unable to return to work and have exhausted their 12 weeks of FMLA leave in the designated "12 month period" no longer have FMLA protections of leave or guarantees of job restoration.
- Employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave.

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29. Will I be allowed to return to my same job after my leave?

Generally, yes. Ordinarily you will be restored to the same position you held prior to the leave, with the same pay and benefits, if the position remains available. You may be restored to an equivalent position rather than the position you held before taking leave if the previous position is not available. The equivalent position must have equivalent pay, benefits, and terms and conditions of employment as the original job.

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30. Am I still entitled to earn fiscal year bonus leave if I have been absent on FMLA leave?

FMLA does not require employers to permit employees on FMLA leave to accrue benefits or seniority during a period of unpaid leave, or to obtain benefits during periods of paid leave, that any other employee on paid leave would not be entitled to accrue. The employer must treat an employee who has used FMLA leave at least as well as other employees on paid and unpaid leave are treated. If an employee is absent due to the employee's own serious medical condition, the absence is considered sick leave, whether paid or unpaid. The employee may not be entitled to earn fiscal year bonus leave. If the employee takes leave other than sick leave to care for an ill or injured family member, the employee may be entitled to earn bonus leave, provided that the employee has otherwise used less than the maximum allowable limits of sick leave for non-FMLA reasons during that fiscal year.

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31. What if I exhaust my 12 weeks of FMLA leave, but I am still unable to return to work?

Depending on the circumstances, an employee may be entitled to additional leave as a form of reasonable accommodation under the provisions of the Americans with Disabilities Act if the employee has a documented disability that prevents him/her from performing all of the essential functions of the position to which appointed. Bargaining unit employees may also be entitled to additional leave under the terms of their current Collective Bargaining Agreement.

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32. Can my employer fire me for complaining about a violation of FMLA?

No, nor can the employer take any other adverse employment action on this basis. It is unlawful for any employer to discharge or otherwise discriminate against an employee for opposing a practice made unlawful under FMLA.

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33. What if I believe my employer is violating the law? Can I file an appeal or a grievance?

No. The Wage and Hour Division administers and enforces the FMLA for all private, state and local government employees, and some federal employees. The Wage and Hour Division investigates complaints. If violations cannot be

satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. An employee may also be able to bring a private civil action against an employer for violations. In general, any complaint must be raised within two years from the date of the alleged violation.

Forms

[WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition \(PDF\)](#)

[WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition \(PDF\)](#)

[WH-381 Notice of Eligibility and Rights & Responsibilities \(PDF\)](#)

[WH-382 Designation Notice \(PDF\)](#)

[WH-384 Certification of Qualifying Exigency For Military Family Leave \(PDF\)](#)

[WH-385 Certification for Serious Injury or Illness of Covered Servicemember -- for Military Family Leave \(PDF\)](#)

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